

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 01-1862 EMSL

DR. CHARLES THOMAS SELL, D.D.S.
Appellant,

v.

THE UNITED STATES OF AMERICA
Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI**

Case No. 4:97CR290-DJS
Case No. 4:98CR177-DJS
The Honorable Judge Donald J. Stohr

SUBSTITUTED REPLY BRIEF OF APPELLANT

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ARGUMENT

In its brief, the Government argues that the District Court should decline to apply the strict scrutiny standard adopted by the United States Court of Appeals for the Sixth Circuit. The Government then argues that, irrespective of the appropriate standard and irrespective of the reasoning of the District Court, the Government has adduced sufficient evidence to support the District Court's involuntary medication order. Included in this argument is an improper attempt to cross-appeal the issue of dangerousness with respect to Dr. Sell. This Court should reject the Government's arguments as meritless and strike the Government's improper attempt to cross-appeal the dangerousness issue.

I. The Court Should Strike the Government's Brief to the Extent That It Seeks Reversal of the District Court's Finding That Dr. Sell Is Not Dangerous.

After the September 9, 1999 hearing, the Magistrate Judge ordered Dr. Sell to be forcibly drugged based upon a finding that Dr. Sell posed a danger to himself and others. The primary issue at the hearing was the Government's theretofore undisclosed theory that Dr. Sell was dangerous. The Magistrate Judge adopted the Government's theory and ordered medication on that basis. On review, the District Court reversed this finding and held that the Magistrate Judge's finding of dangerousness was clearly erroneous. Now, in its brief submitted to this Court, the Government is again arguing that Dr. Sell is dangerous and that therefore "[t]he

District Court's order vacating the Magistrate Court's finding of dangerousness [] should be reversed." (Government's Brief at 48). The Court should strike this argument and all portions of the Government's brief relating thereto because the Government does not have standing to challenge the District Court's finding that Dr. Sell is not dangerous.¹

The Government does not have standing to challenge this finding because it did not appeal the District Court's April 4, 2001 Order. The filing of a cross-appeal is a required practice when the would-be cross-appellant seeks to enlarge its own rights or diminish those of the appellant, and this requirement may be jurisdictional. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479, 119 S. Ct. 1430 (1999). The Government contends that it is entitled to reintroduce its theory of dangerousness before this Court because an appellee may argue for affirmance on alternative legal

¹ This Court should strike the following sections from the Government's Brief: (1) the first full paragraph of page 4 through the second full paragraph of page 6, including the footnotes; (2) the first full paragraph of page 7 through the first full paragraph of page 9; (3) the sentence beginning "An FBI agent testified . . ." in the last paragraph on page 9 through the first full paragraph on page 11; (4) the sentence beginning "He stated that he wanted to prove . . ." in the first full paragraph on page 12; (5) the first full paragraph on page 17; (6) the second full paragraph on page 26 through the first full paragraph on page 27; (7) the phrase "render him non-dangerous" in the first full paragraph on page 31; (8) the section entitled "C. Dangerousness" beginning on page 40 and running through the first full sentence on page 48, including the footnote (collectively referred to as the "Dangerousness References").

theories. (Government's Brief at 41 n.8). Justice Brandeis described this rule as follows:

It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

United States v. American Railway Express Co., 265 U.S. 425, 435, 44 S. Ct. 560, 68 L. Ed. 1087 (1924) (footnote omitted). This rule applies in criminal cases as well. *See, e.g., United States v. Lieberman*, 971 F.2d 989, 996 n.5 (3d Cir. 1992).

In the instant case, however, the Government has not advanced an alternative legal theory to drug Dr. Sell in order to restore his competency. Instead, the Government specifically requests that this Court reverse the District Court's finding that Dr. Sell is not dangerous. (Government's Brief at 48). When an appellee seeks reversal, the appellee must file a cross-appeal:

While it is well-settled that an appellee need not file a cross-appeal in order to argue different grounds to support an affirmance, the filing of a cross-appeal *is* required where an appellee seeks alternation of a judgment rendered in whole or in part in its favor.

Winstead v. Indiana Ins. Co., 855 F.2d 430, 434-35 (7th Cir. 1988) (internal citation omitted) (emphasis in original).

Even if the Government's arguments could somehow be construed as seeking affirmance of the District Court's Order on alternative grounds, the Government's dangerousness arguments are still not properly before this Court. The ultimate test for whether a cross-appeal must be taken is whether the appellee is seeking to enlarge its own rights or to lessen those of the appellant. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. at 479. If so, a cross-appeal is required. *Id.*

In this case, a finding of dangerousness would clearly lessen Dr. Sell's rights because this determination will establish the standard of review applicable to the instant involuntary medication inquiries and will likewise affect all subsequent inquiries. If this Court were to reverse the District Court's finding of non-dangerousness, the District Court would defer to the opinion of the Government's institutional psychologists with respect to each of the involuntary medication issues that arises henceforth. Therefore, the Government cannot challenge the District Court's finding that Dr. Sell is not dangerous without having filed a cross-appeal. *See, e.g., Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701 n.13 (8th Cir. 1987) (finding an appellee's arguments for reversal of a finding below to be improper despite the fact that the appellee was arguing for affirmance of the appealed order "because of the [appellee's] failure to assert a cross-appeal seeking reversal of the district court's finding of disparate impact."); *E.E.O.C. v. The Chicago Club*, 86 F.3d 1423, 1432 (7th Cir. 1996) (holding that cross-appeal was required where the finding

of fact that the appellee, while requesting affirmance, sought to have reversed would henceforth alter the burden of proof).

In the instant case, the Government is not simply seeking to interpose an alternative legal argument in support of medication; it is seeking a reversal of the district court's finding of non-dangerousness—a finding that will impact all subsequent inquiries into Dr. Sell's constitutional rights and a finding based upon the District Court's first-hand observations of Dr. Sell. Whether Dr. Sell is drugged based upon dangerousness or solely to restore competency will define the standard applicable to related inquiries, such as the medical appropriateness of such drugs or the impact the administration of such drugs will have on Dr. Sell's fair trial rights.

For example, if Dr. Sell were medicated on the basis of dangerousness, his ability to resist medication during trial will likely be impaired, given the relatively low threshold showing required of the Government in the dangerousness context. (*See, e.g.*, Government's Brief at 43) (arguing that the burden was on Dr. Sell to "offer medical evidence that he is not dangerous.") Conversely, if Dr. Sell were drugged solely to render him competent to stand trial, the Government will be required to satisfy the strict scrutiny standard in order to proceed to trial. Obviously, if this Court were to reverse the District Court and find that Dr. Sell is dangerous, the decision will adversely affect Dr. Sell's rights, and, therefore, the Government cannot assert this argument without having filed a cross-appeal challenging this finding.

Because the Government's arguments relating to dangerousness are not properly before the Court, the Government's dangerousness arguments should accordingly be stricken.

II. The Court Failed to Apply the Appropriate Standard in Conducting Its Involuntary Medication Analysis.

The United States Court of Appeals for the Sixth Circuit is the only federal appellate court to have considered the appropriate standard to be applied when the federal government seeks to drug pretrial detainees for the sole purpose of restoring competency. *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998) (holding that a strict scrutiny standard should be applied). The Government has requested that this Court reject the Sixth Circuit's strict scrutiny standard and instead adopt the standard articulated by the District Court for the Southern District of California in *United States v. Sanchez-Hurtado*, 90 F. Supp. 2d 1049 (S.D. Cal. 1999). Although the Government never actually explains what it believes this standard to be (or why it is preferable to the Sixth Circuit's standard in *Brandon*), it nevertheless suggests that the standard is somewhat less onerous than that of *Brandon*.

This Court should reject the Government's arguments for two reasons. First, the district court's decision in *United States v. Sanchez-Hurtado* misinterpreted the Supreme Court's holding in *Riggins*, and the Court should therefore adopt the *Brandon* strict scrutiny standard. Second, even if the Court were to adopt the

United States v. Sanchez-Hurtado standard, the District Court's order should still be reversed because the District Court did not apply that standard and the Government cannot satisfy it.

A. The strict scrutiny standard should be applied when assessing the propriety of forcibly medicating non-dangerous pretrial detainees.

As a threshold matter, the court in *United States v. Sanchez-Hurtado* did not order involuntary medication; it simply held that a further hearing on the matter was required consistent with the appropriate standard. In determining what standard should be applied, the court found “the reasoning of the Sixth Circuit in *Brandon* particularly compelling.” 90 F. Supp. 2d at 1054. However, the court took issue with the Sixth Circuit's adoption of the strict scrutiny standard. The court reasoned that because the Supreme Court in *Riggins v. Nevada* declined to prescribe a substantive standard for the involuntary medication issue, the Sixth Circuit's adoption of the strict scrutiny standard was somehow improper:

Although *Riggins* supports holding a judicial hearing in this situation . . . the majority opinion does not set forth any substantive standards to apply to the hearing. Accordingly, this Court looks to *Brandon* for such standards. The *Brandon* court found that involuntary treatment with antipsychotic drugs affected a fundamental right. As a result, the court stated that the government's request to forcibly medicate Brandon “must be reviewed under the strict-scrutiny standard.” This result, however, is contrary to the majority opinion in *Riggins*, wherein the Supreme Court clearly stated that it was not adopting a standard of strict scrutiny. Accordingly, this Court declines to adopt a standard of strict scrutiny for the judicial hearing in this case.

90 F. Supp. 2d at 1055.

Contrary to the *Sanchez-Hurtado* court's reasoning, however, the Supreme Court in *Riggins* did not disapprove of the strict scrutiny standard. The court declined to prescribe *any* substantive standard. The majority's disavowal of the strict scrutiny standard resulted from Justice Thomas's suggestion in his dissent that the majority had adopted a strict scrutiny standard. Justice Thomas based this conclusion on the majority's requirement that courts find that medication is "*required*" and that the Government's "other *compelling* concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs." *United States v. Riggins*, 504 U.S. 127, 156, 112 S. Ct. 1810 (1992)(emphasis in original). Justice Thomas argued that this standard was tantamount to a strict scrutiny standard. The majority argued that it had not adopted the strict scrutiny standard:

Contrary to the dissent's understanding, we do not "adopt a standard of strict scrutiny." We have no occasion to finally prescribe such substantive standard as mentioned above, since the District Court allowed administration of Mellaril to continue without making *any* determination of the need for this course or *any* findings about reasonable alternatives.

United States v. Riggins, 504 U.S. at 136(internal citation omitted).

In stating that it was not adopting the strict scrutiny standard in that case, the Court was simply making clear that it was declining to adopt *any* substantive standard, despite the fact that, as the concurrence recognized, the strict scrutiny standard is implicit in the majority's reasoning. The district court in *United States*

v. Sanchez-Hurtado misread the majority opinion in *Riggins* rejecting a strict scrutiny standard, whereas in actuality the issue was not before the Court and the Court therefore declined to prescribe the proper standard. Because the Court's decision in *United States v. Sanchez-Hurtado* is premised upon a misinterpretation of *Riggins*, this Court should adopt the strict scrutiny standard adopted by the Sixth Circuit in *Brandon*.

B. The District Court Did Not Follow the *United States v. Sanchez-Hurtado* Standard.

After erroneously rejecting *Brandon*'s strict scrutiny standard, the district court in *United States v. Sanchez-Hurtado* "returned to *Riggins* for guidance." Combining the reasoning of the *Riggins* decision (and Justice Kennedy's concurrence in particular) and the *Brandon* decision, the court adopted the following standard:

First, the government must demonstrate that "administration of antipsychotic medication [is] necessary to accomplish an essential state policy." *Riggins*, 504 U.S. at 138, 112 S. Ct. 1810. Second, the government must show that "there is a sound medical basis for treatment with antipsychotic medication." *Id.* at 140, 112 S. Ct. 1810 (Kennedy, J., concurring). In making this showing, the government may provide "medical testimony regarding [Defendant's] mental illness and its symptoms, as well as the effects that antipsychotic medication will have, both beneficial and harmful, on [Defendant's] physical and mental health." *Brandon*, 158 F.3d at 960. **Third, and most importantly, the government must establish "that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel."** *Riggins*, 504 U.S. at 141, 112 S. Ct. 1810 (Kennedy, J., concurring). Although this Court

rejects the strict scrutiny standard set out in *Brandon*, this Court agrees that “the risk of error and possible harm involved in deciding whether to forcibly mediate an incompetent, non-dangerous pre-trial detainee” are substantial. *Brandon*, 158 F.3d at 961. Accordingly, the government must establish these elements “by clear and convincing evidence.” *Id.*

Id. at 1055 (emphasis added).

The Government never actually explains this standard or how it was applied in the instant case. The reason for this omission is that the District Court’s analysis failed to satisfy this standard. The District Court was required to find, among other things, that there was no significant risk that the medication will impair or alter in any material way Dr. Sell’s capacity or willingness to react to the testimony at trial or to assist his counsel. This is the precise inquiry the District Court found to be “premature.” Therefore, even under the alternative standard advanced by the Government, the District Court erred, and this Court should accordingly reverse the District Court’s April 4, 2001 Order.

III. The District Court Failed to Require the Government to Prove Its Case by Clear and Convincing Evidence.

In addition to failing to apply the strict scrutiny standard, the District Court also failed to require the Government to satisfy its evidentiary burden of establishing each of the involuntary medication issues by clear and convincing evidence. In its Order, the District Court adopted the Magistrate’s conclusion that “forcible administration of anti-psychotic medication was supported by the

government's strong showing that such drugs . . . are the only way to render the defendant . . . competent to stand trial on the very serious and violent offenses for which he now stands indicted." (April 4, 2001 Order at 16)². This conclusion is improper in two regards. First, the District Court applied the wrong standard. A "strong showing" is insufficient; the Government is required to prove its case by clear and convincing evidence. *United States v. Weston*, 134 F.Supp.2d 115, 120 (D.D.C. 2001). Second, even if the Government had otherwise satisfied this burden, the District Court's conclusion that mind-altering drugs are "the only way" to restore Dr. Sell to competency is not the finding that is required to warrant involuntary medication. The Government must establish by clear and convincing evidence that the medication is, among other things, medically appropriate, that it has a reasonable probability of restoring Dr. Sell to competency, and that Dr. Sell's fair trial rights will not be impaired. *Weston*, 134 F. Supp. 2d at 121. The District Court failed altogether to analyze the probability that Dr. Sell would be restored to competency or the impact medication would have on Dr. Sell's trial rights.

² In *Weston*, relied upon by the Magistrate Judge, the District Court of the District of Columbia found that there were two essential government interests, either of which supported the forcible medication of Russell Weston: (1) to render him non-dangerous and (2) to render him competent. 134 F. Supp. 2d at 127. However, the Magistrate Judge's failure to apply the proper standard for determining when forcible medication is appropriate to restore competency, as followed in *Weston*, and cursory treatment of the competency issue, indicates an erroneous interpretation of the relevant precedent.

In addition, the District Court's adoption of the Magistrate Judge's finding of medical appropriateness was flawed because the Magistrate Judge made those findings in connection with a finding of dangerousness—under which circumstances courts defer to the opinion of institutional psychologists, such as the Government's witnesses in this case. The Court concluded that “the potential benefit of treatment far outweighs any risks” and that the “medical benefits outweigh the medical risks.” (April 4, 2001 Order at 6). This balancing test is not consistent with the strict scrutiny standard or the requirement that the Government adduce clear and convincing evidence. Moreover, several of the District Court's specific findings in the context of medical appropriateness are flawed. For example, the District Court found that medication was medically appropriate because “the serious side effects of the medication will be ameliorated by newer drugs and/or changing of the drugs.” (April 4, 2001 Order at 5-6). Yet, the “newer drugs” with a more benign side effect profile cannot be administered involuntarily and therefore cannot be relied upon for a finding of medical appropriateness.

The District Court further took objection to Dr. Sell's “generalized arguments” against medication and found that Dr. Sell is ill-equipped to have any meaningful input into the medication inquiry because he suffers from delusions. (April 4, 2001 Order). There is no evidence in the record that Dr. Sell's delusions impair his ability to assess the side effects of antipsychotic medication. The record

evidence demonstrates that Dr. Sell's delusions are persecutory in nature and directed in particular to the federal government. Dr. Sell is a dentist with extensive medical training and a constitutional right to resist forcible drugging. Persons diagnosed as suffering from mental illness should not be deprived of their constitutional right to resist forcible medication.

IV. The District Court Failed to Take Into Account Dr. Sell's Trial Rights.

The District Court concluded "That the effects of medication might prejudice the defense at trial is a serious issue, but not one which can preclude forcible medication based on the necessarily generalized manner in which the argument must be presented at this time." However, under the precedent relied upon by the District Court, some inquiry into the effect medication will have on Dr. Sell's fair trial rights is an absolute prerequisite to involuntary medication. In *Weston*, the District Court of the District of Columbia stated that

Although the government's interests in treating Weston's dangerousness and restoring his competency are essential and antipsychotic medication is the least intrusive means to meet these interests, the Court must still balance those interests against Weston's trial rights Accordingly, before allowing the government to medicate Weston, the Court must consider the potential impact of medication on his fair trial rights."

Weston, 134 F. Supp. 2d at 132-33 (emphasis added) (internal citations omitted).

The fair trial rights that the Court should consider include: (1) the right not to be tried unless competent to consult with counsel and assist in his defense; (2) the

right to testify and to present his own version of events in his own words; (3) the right to be present in the courtroom at every stage of the trial; and (4) the right to present a defense, including an insanity defense. *Weston*, 134 F. Supp. 2d at 133. The District Court wholly failed to consider Dr. Sell's fair trial rights, instead concluding that the fair trial inquiry was premature and that "a showing that he is unable to assist properly in his defense would result in a continued finding that defendant is not be [sic] competent to stand trial."

CONCLUSION

For all the foregoing reasons, the Dr. Sell respectfully requests that the Court reverse the District Court's April 4, 2001 Order and hold that involuntary medication is inappropriate based upon the record, and further requests that the Court strike the Dangerousness References from the Government's Brief. In the alternative, Dr. Sell requests that the Court reverse the District Court's April 4, 2001 Order and remand the case for additional proceedings applying the appropriate legal test for involuntary medication, the appropriate burden of proof, and the appropriate standard of review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Appellant Dr. Charles Thomas Sell, D.D.S and certifies the following:

1. The Reply Brief of Appellant Dr. Sell complies with the type-volume limitation set forth within Fed.R.App.P. 32(a)(7)(B)(i), in that the Brief contains 3,354 words.
2. The word processing software used to prepare the Substituted Reply Brief of Appellant was Microsoft Word, Version 8.0, Office 2000.
3. The attached 3 ½ computer diskette contains the Substituted Reply Brief of Appellant Dr. Sell. This disk has been scanned by Cheyenne AntiVirus for Windows 95, Version 4. 0 and was found to be free of any virus. In addition, a 3 ½ computer diskette containing the Reply Brief of Appellant Dr. Sell has been served on all counsel of record. See 8th Cir. R. 28A(d).

Barry A. Short
Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of the foregoing and a 3.5 inch floppy disk containing a copy of the same were sent via first-class United States mail, postage prepaid, this 24th day of July 2001 to:

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